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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1608

AUGUSTINE LUNA and GUNERSINDA LUNA,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RAYMOND BERNHARD GRUNEWALD
16 Court Street
Brooklyn, New York 11201
Attorney for Petitioners

Of Counsel
JEROME C. DITORE
16 Court Street
Brooklyn, New York 11201

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Comes now Raymond Bernhard Grunewald, attorney for the petitioners, and hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case, entered March 23, 1971.

Opinions Below

The Court of Appeals affirmed the judgments of conviction of petitioners without opinion.

Jurisdiction

The judgment of the panel of the Court of Appeals was entered on March 23, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Questions Presented

1. Whether it is a deprivation of a fair trial in a criminal narcotic case for the trial court to charge as essential elements of the substantive crimes of receiving and concealing heroin, elements of other narcotic offenses for which petitioners were not indicted.

2. Whether it is a denial of a fair trial and due process for the trial court to fail to instruct the jury in a conspiracy under 18 U.S.C. § 371, that it must specifically find as a separate essential element of the general conspiracy to possess, sell or distribute heroin that the petitioners knew the heroin was illegally imported into the United States.

3. Whether the failure of the trial court to charge the jury that the statutory presumption from possession of Section 174, Title 21 U.S.C. is applicable, if it is, to a general conspiracy under 18 U.S.C. § 371, requires the petitioners to assume the burden that the jury applied this presumption in its deliberations.

4. Whether the petitioners were denied a fair trial by the prejudicial introduction into evidence of a gun alleged carried by one of the petitioners during the alleged commission of a felony where the Government conceded that its proof was insufficient, and was so found by the trial court, to establish that the gun was carried unlawfully by one of the petitioners in violation of 18 U.S.C. § 924 (c) (2).

5. Whether the trial court's charge on credibility which equated the interests of Government agents with *truth* while relegating the interests of petitioners to something less and more mundane, was highly prejudicial to a fair trial.

Statement

After a jury trial in the United States District Court for the Eastern District of New York, petitioners, husband and wife, were convicted on four counts charging narcotic violations (21 U.S.C. 174, Counts One and Four; 26 U.S.C. 4704 (a), and 4705 (a), Counts Two and Three), and a conspiracy under 18 U.S.C. 371, to violate 21 U.S.C. 174, and 26 U.S.C. 4704 (a), 4705 (a). In addition petitioner Augustine Luna was convicted of carrying unlawfully a firearm during the commission of a felony (18 U.S.C. 924 (c) (2) Count Five).

Petitioner Augustine Luna was sentenced to fifteen years imprisonment on Counts One, Three and Four, and fined $5,000.00 on Count Four; ten years on Count Two and five years on Count Six, both sentences to run concurrent with the fifteen year sentences. Augustine Luna was also sentenced to one year imprisonment to run consecutively to the other terms of imprisonment. Petitioner Gunersinda Luna was sentenced to a term of twelve years on Counts One, Three and Four, ten years on Count Two, and five years on Count Six, all to run concurrently.

The government's evidence consisted entirely of testimony of federal narcotics agents (except for the testimony of the government's chemist) who kept petitioners under undercover and visual surveillance (T.T. 46-86, 137-149a, 154-164, 238-239, 254-267.)*

In essence, the testimony of the federal agents set forth how one of their numbers, agent Rivera—an undercover agent, contacted petitioner Augustine Luna at his home on

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* Reference key T.T. refers to pages of transcript of trial proceedings.

the night of September 6, 1969, and agreed to buy from petitioner Augustine Luna a quantity of cocaine and heroin for a special price of $18,000.00. On this evening, petitioner Augustine Luna asked the undercover agent if he would like a sample of the heroin. The agent said he would. Augustine Luna sent his wife to another part of the house. She returned with a sample of the heroin (0.44 grams) in a tin foil wrapper which was given to the agent who examined it. This sample of heroin forms the subject matter of Counts One, Two and Three (T.T. 50-51, 69, 132, 133).

On the evening of November 6th, 1969, the undercover agent made arrangements with petitioner Augustine Luna to pick up the narcotics the following day November 7, 1969. On the afternoon of that day the agents, armed with a search warrant, entered the home of petitioners, arrested them and found a shopping bag containing quantities of heroin and cocaine. This heroin forms the subject matter of Count Four (receiving and concealing). At the time of petitioners' arrest a gun was found on the person of Augustine Luna (Count Five). These events also form the basis for the conspiracy under 18 U.S.C. 371 to possess, sell or distribute heroin in violation of 21 U.S.C. 174, 26 U.S.C. 4704 (a), 4705 (a) (T.T. 67-69, 72-73, 77-79, 145, 259).

The government during the course of presenting its case recalled the undercover agent to fill in a missing element on the Tax Stamp Count (Three).

> "*Mr. Boyd*
>
> Q. Directing your attention to the 6th day of November, 1969, I believe you testified that you received from Augustine Luna a certain white powder contained in Government's Exhibit 2A for identification; is that correct? A. Yes.

Q. When this powder was transferred to you, did you notice any tax stamps? A. No, Sir.

Q. Not on the package in which it was transferred? A. No, Sir." (T.T. 238-239)

Petitioners testified on their own behalf and denied any dealings in narcotic drugs or in meeting with any federal agents on November 6th, and contradicted the agents' version of events of November 7th, which was corroborated by a disinterested witnesss for petitioners (T.T. 289-305, 322, 326-329, 333, 337, 341-344, 350-354, 356, 363-365, 374, 377-379).

During its charge the trial court instructed the jury on the law as to the essential elements of each of the crimes charged against petitioners.

Counts One and Four—violations of 21 U.S.C. 174

The first and fourth counts of the indictment charged that petitioners on November 6th and 7th, respectively, wilfully and knowingly received and concealed heroin knowing the heroin to have been imported illegally into the United States.

The trial court, pursuant to the government's request, instructed the jury that there were three essential elements to these two crimes which the jury had to find beyond a reasonable doubt before they could convict. The instructions were as follows:

> "With respect to Count One and Four, which are *receiving* or *concealing* heroin, there are three essential elements. First the act or acts of receiving or concealing or *facilitating the concealment or transportation* of heroin, which had been imported into the United States contrary to law. [Emphasis supplied]

> Secondly, doing it with knowledge that the heroin was imported into the United States contrary to law, and Thirdly, doing such act knowingly and unlawfully." (T.T. 464-466)

The court further instructed the jury that it could utilize the statutory inference arising from possession as contained in Section 174 of Title 21 U.S.C. only for finding the second element of these crimes: "Doing it with knowledge that the heroin was imported into the United States contrary to law" (T.T. 465-466).

During oral argument the Court of Appeals commented to petitioners' counsel that the trial court's instructions to the jury as to elements of crimes for which petitioners' were *not* indicted, and the limitation of the presumption only to the second element, was not error because the petitioners "possessed" the heroin.

Count Two (stamp tax)—violation of 26 U.S.C. 4704 (a)

In continuing its instructions the court charged the jury that there were two essential elements under Count Two—the so called "tax stamp count":

> "*First the act or acts of distributing not from an original stamped package bearing revenue stamps required by law* and secondly doing these acts knowingly and unlawfully" (T.T. 466-467). (Emphasis supplied)

Count Five—Carrying a gun unlawfully—18 U.S.C. 924 (a)(2)

Count Five charged petitioner Augustine Luna with unlawfully carrying a firearm during the commission of a federal felony. The trial court instructed the jury that:

> "The essential elements would be that the defendant who is charged [d] with carrying a firearm, that he was committing a felony which is the basic question you have to determine whether there was a transaction with respect to heroin and that the charge [sic., carrying] of the firearm was unlawful and not pursuant to any permit or license." (T.T. 468-469)

At the conclusion of the Court's charge the government prosecutor requested the trial court to change the instructions given as to the elements of Count Five.

> "Mr. Boyd [Prosecutor]: I respectfully request that your honor's charge regarding the firearm, that the question of a permit is not a necessary theory and they [jurors] did not concern themselves about the matter of a permit.
>
> The Court: I am not sure about that. I am not sure you have your proof on that.
>
> Mr. Boyd: I think that is correct, if you are carrying a firearm while in the commission of a felony prosecutable in a federal court.
>
> The Court: It says 'unlawfully'.
>
> Mr. Boyd: That's correct.
>
> The Court: You did not prove he did not have a permit card and when he got to the stand, he denied having a firearm." (T.T. 483)

The government in its brief and on oral argument before the Court of Appeals conceded that its proof under this count was insufficient to warrant conviction but claimed that petitioner Augustine Luna's denial of possession of the gun established the missing proof from which the jury could infer that he carried the gun unlawfully (Gov't Brief, p. 14).

The conspiracy instructions

The court in its charge to the jury concerning the essential elements of the conspiracy (18 U.S.C. 371) stated:

> "Finally we have the conspiracy count which has four elements that has to be proved. First that the conspiracy described in the indictment was wilfully found and existed at or about the time alleged.
>
> Secondly, that the accused wilfully became members of the conspiracy,
>
> Thirdly, that one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment, and
>
> Fourthly, that the overt act was knowingly done in furtherance of some object or purpose of the conspiracy. If you find beyond a reasonable doubt from the evidence in the case that the existence of the conspiracy charged in the indictment has been proved and during the existence of the conspiracy one of the overt acts alleged was knowingly done by one of the conspirators in furtherance of some object a purpose of the conspiracy, then proof of the conspiracy offense charged is complete." (T.T. 469-470)

The court further charged that "a person can become a member of the conspiracy without knowing all the details." (T.T. 470).

The trial court did not charge the jury that they had to find as a separate essential element of the crime of conspiracy that petitioners know the heroin was imported illegally into the United States; nor was there any instruction to the jury regarding any applicability of the statutory presumption of Section 174, of Title 21 U.S.C. if such was in fact applicable to a conspiracy under 18 U.S.C. 371 to violate Section 174.

The government in its brief and on oral argument before the Court of Appeals conceded that under the Section 371 conspiracy it was "required to show that appellants knew the heroin was illegally imported, and that unless the jury was entitled to rely on the statutory presumption of Section 174, its proof on the conspiracy was insufficient" (Gov't. brief, p. 10).

The trial court in charging on the "important subject" of credibility of the Government witnesses *vis* a *vis* petitioners and their witnesses instructed the jury as follows:

> "You are not to give any greater weight or credibility to the testimony of a witness in the case because he is a government agent you evaluate his testimony in the same manner as you evaluate the testimony of any other witness. *Of course, the government witness has an interest in establishing the truth of what they have told to the Grand Jury and to the jury. You are to determine whether that interest is sufficient so that they might fabricate an entire case,* as defendants assert here. The defendants have an *interest, even if they are not guilty of the offense, of trying to show they are not guilty* and you can consider the interests of witnesses on both sides as to which set of facts you are going to believe." (T.T. 472, 474)

At the conclusion of the charge petitioners' attorney requested the court to charge, as a matter of law, that one of petitioners' witness, a Mrs. Smoldine, was a disinterested witness. The trial court stated it might have so charged if the request was made prior to its charge, but would not call attention to it at the end of the case (T.T. 481).

The Court of Appeals upheld the convictions of petitioners without opinion.

ARGUMENT

1. *In a criminal case, and particularly in a narcotics case where the crime is considered heinous and arouses strong biases and prejudices, a defendant is entitled to have the jury instructed only on the specific elements that must be proved to establish the crime charged. United States* v. *Gillilan*, 288 F.2d 796 (2d Cir.), *cert. denied Apex Distributing Co.* v. *United States*, 368 U.S. 821, 82 S. Ct. 38, 7 L. Ed. 2d 26 (1961); *Kelley* v. *United States*, 275 F.2d 10 (D.C. Cir. 1960); *United States* v. *Rybecki*, 403 F.2d 509, 603 (6th Cir. 1968); *Thomas* v. *United States*, 151 F.2d 183, 186 (6th Cir. 1945). *Any charge which ascribes to a defendant an offense other than that for which he is indicted, in order to establish the crime charged, is plain error and a denial of a fair trial. Bollenbach* v. *United States*, 326 U.S. 607, 66 S. Ct. 402, 406 (1946); *Thomas* v. *United States, Id.*

Count One of the indictment charged petitioners with the separate and specific offenses of wilfully and knowingly receiving and concealing, on November 6, 1969, a quantity of heroin knowing it to have been imported illegally into the United States in violation of 21 U.S.C. §174. Count Four charged a similar crime except that the date of the offense was November 7, 1969.

§174, Title 21, U.S.C., sets forth, in the disjunctive, multiple offenses:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States . . ., contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to

> have been imported or brought into the United States contrary to law, or conspires to commit any such act . . ."

It is obvious that "Congress intended to place its condemnation upon each distinct, separate part of every transaction coming within the mischiefs intended to be reached and remedied." *Burton* v. *United States,* 202 U.S. 344 (1906); *Martinez* v. *United States,* 220 F.2d 740, 743 (1st Cir. 1955); *Vasquez* v. *United States,* 290 F.2d 897 (9th Cir. 1961).

The trial Court, in charging the jury on these two counts, read to the jury part of §174, Title 21 U.S.C., which included other specific offenses not charged in the indictment:

> "The first Count and the Fourth Count are under Section 174, Title 21 of the United States Code, which provides in part 'that whoever knowingly received, conceals, buys, sells or in any manner facilitates the transportation, concealment, sale of any narcotic drug, after being imported or brought into the United States contrary to law, shall be guilty of an offense against the laws of the United States'" (T.T. 461).

The trial court thereafter, pursuant to the government's requests, instructed the jury that there were three essential elements to the crimes charged under Counts One and Four which had to be found beyond a reasonable doubt before appellants could be found guilty under these two counts (T.T. 465).

The trial court instructed the jury as to these three elements as follows:

> "With respect to Counts One and Four, which are *receiving or concealing heroin,* there are three essen-

> tial elements. First the act or acts of receiving or concealing *or facilitating the concealment or transportation of heroin,* which had been imported into the United States contrary to law.
>
> Secondly, doing it with knowledge that the heroin was imported into the United States contrary to law, and
>
> Thirdly doing such act knowingly and unlawfully'' (T.T. 465). [Emphasis supplied]

Although the second and third essential elements are common to all alleged violations of §174, the first essential element varies with the specific offense or offenses charged in the indictment. (*United States* v. *Llanes,* 374 F.2d 712, 715 (2d Cir. 1967.)

There is no doubt that the trial court instructed the jury, that they could find the petitioners guilty of the specific crime of receiving and concealing, if they found in addition to elements two and three, that petitioners were guilty of facilitating the transportation of the heroin, or facilitating the concealment of the heroin or both, crimes for which petitioners were not charged.

The jury, for all that we know, had a right to find, and could have found that petitioners, under the Court's instructions, were *guilty of facilitating* the transportation, or of *facilitating the* concealment of the narcotics, or both, *without* finding them guilty of *the crime of receiving* and *concealing* with which they were charged. The jury also could have found petitioners guilty of receiving and concealing only because they found petitioners guilty of two other crimes for which they were not indicted. There was

evidence in the Government's case which suggested and from which the jury could have found that these crimes for which petitioners were not indicted, were committed by them.

The government in its brief to the Court of Appeals argued that the error in the charge was harmless because on the record there was "no rational interpretation of the evidence under which the jury could have convicted the appellants under a theory of facilitation but not under the possession or concealment crimes" and that any "acts of facilitation that occurred here were done by one or the other or both of the appellants. It follows that every act of facilitating was equally an act of 'receiving' or 'concealing' " (Gov't brief p. 8). Thereby the Government urged that the facilitation crimes were synonomous with the crimes of receiving and concealing.

The Court of Appeals, during the argument of petitioners' counsel on this point, commented that the trial court's charge as to the offenses for which petitioners were not indicted, made no difference because petitioners had possession of the heroin.

But the answer to the Circuit Court's comment and the government's argument was aptly given by this Court in *Bollenbach* v. *United States,* 326 U.S. 607, 66 S. Ct. 402, 406 (1946):

> "In view of the Government's insistence that there is abundant evidence to indicate that Bollenback was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedures and standards appropriate for criminal trials in the federal courts."

It is not, therefore, what the government or the Court of Appeals determines from the record but whether the jury has found petitioners' guilt from a proper instruction as to the essential elements of the crimes charged.

Further, the trial court failed to instruct the jury as to any definition of "receiving", "concealing" or even "facilitation". The jury was left to their own devices without any legal guides as to what these specific acts or offenses meant. Nor could the jury utilize the statutory presumption from possession of §174, Title 21, U.S.C., to find these specific acts or offenses. The court limited the jury's use of the presumption solely to finding the element of knowledge by petitioners of the illegal importation of the heroin and by this limitation, rejected the use of the presumption by the jury to find the specific acts or offenses of concealing, receiving, or facilitation.

The Court charged the jury as to the use of the statutory presumption of §174 as follows:

> "As stated the burden is always on the prosecution to prove every essential element of the crime charged beyond a reasonable doubt and it does not impose a defendant in a criminal case any duty of producing evidence if you find beyond a reasonable doubt that the accused had possession of the heroin as charged that fact alone, unless explained to your satisfaction by other evidence in the case, permits you to draw the inference and find that the heroin was imported or brought into the United States of America contrary to law. It does not require you to so find, but it permits you to and permits you—but does not require you to draw the further inference and find the accused knew that the heroin was imported or brought into the United States contrary to law." (T.T. 465-466).

To add to the jury's confusion there was no direct or circumstantial evidence in this case that petitioners either received or concealed the heroin in question. On the two occasions that gave rise to Counts One and Four, the heroin was shown to and in plain sight of the only federal agent (undercover agent Rivera) to testify as to the dealings with petitioners—there was no "concealment." There was no evidence that the heroin was "received" by petitioners from anyone. The sample of heroin, subject of the first count, was in the petitioners' house. There was no evidence of a receipt of it by petitioners. The heroin, subject of the second count, was transported by one of the petitioners from the house next door. Again there was no evidence that it was "received" from anyone. Without the use of the statutory presumption, the government's evidence failed to establish any acts of concealment or receipt of the heroin and it cannot rely, as it suggests (Gov't brief below p. 9), on speculation that at some illusory point in time, petitioners must have received the heroin. Criminal proof or evidence calls for something more substantial than speculation for a jury to work with.

For the reasons stated petitioners' conviction on the substantive crimes alleged in Counts One and Four was based on insubstantial evidence, and erroneous accusations of crimes for which they were not indicted. They were thereby denied a fair trial according to the standards required of a criminal trial in a federal court.

2. *Petitioners were convicted of a general conspiracy* (18 U.S.C. 371) *to possess, sell or distribute heroin and other narcotic drugs in violation of* 21 U.S.C. §174, 26 U.S.C. §§4704(a), 4705(a). *The trial Court failed to instruct the jury that knowledge by petitioners that the*

heroin was illegally imported was an essential element of this crime.

Prior to the trial court's instructions on the essential elements of the general conspiracy the court had instructed the jury as to the essential elements of the first four substantive crimes against petitioners, and as to the elements of the fifth crime (firearms) against the petitioner Augustine Luna. The Court carefully listed the essential elements of each of these five crimes so that the jury knew that these elements applied respectively to the five substantive crimes for which they were listed.

When the trial court reached the conspiracy charge which was alleged in the indictment (Sixth Count) under the general conspiracy statute (18 U.S.C. §371), the court did not read the conspiracy count to the jury but listed the essential elements of a general conspiracy and discussed the general rules of conspiracy.

The Court instructed the jury as follows:

> "Finally, we have the conspiracy count which has four elements that has to be proved. First that the conspiracy described in the indictment was willfully formed and existed at or about the time alleged.
>
> "Secondly, that the accused willfully became a member of the conspiracy.
>
> "Thirdly, that one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment, and
>
> "Fourthly, that the overt act was knowingly done in furtherence of some object or purpose of the conspiracy. If you find beyond a reasonable doubt from the evidence in the case that the existence of the conspiracy charged in the indictment has been proved

and during the existence of the conspiracy one of the overt acts alleged was knowingly done by one of the conspirators in furtherence of some object or purpose of the conspiracy, then proof of the conspiracy offense charged is complete .

"A person can become a member of the conspiracy without knowing all the details. Somebody who had no knowledge of the conspiracy and just acts in a way that happens to further some object of the conspiracy does not thereby become a conspirator. Before you could find the defendant has become a member of the conspiracy, the evidence must show beyond a reasonable doubt that the conspiracy was knowingly formed and that that defendant willfully participated in it. That he acted willfully. Acted willfully means to act volunatrily, intently, with the specific intent to do something the law forbids or to fail to do something that the law requires to be done. That is to say to act or participate with a bad purpose to either disobey or disregard the law. In determining whether a conspiracy existed, you need consider it all, but in determining whether a particular defendant was a member of a conspiracy you can consider only the acts or statements of that particular defendant, because a person cannot be bound by act or declaration of another to be a participant until it is established that a conspiracy existed and that he was one of the members of the conspiracy.

"The element of knowledge has been mentioned in connection with the knowing sale of heroin in the *first, second,* and *fourth* counts. This involves a state of mind on the part of the defendant. The burden as to the prosecution is to prove that state of mind. A person does not do a wrongful action, if the action results from a mistake or any other innocent reason. If you believe the testimony of the Government witnesses, you may find the defendant knew they were doing something wrong." (T.T. 469-472)

This was the sum and substance of the court's charge to the jury on this general conspiracy. It reveals beyond any doubt that the trial court not only failed at any point in this charge on the conspiracy count to instruct the jury that knowledge of illegal importation was a necessary element of the conspiracy but by listing all the necessary elements of the conspiracy to the jury which the jury must have taken to be all inclusive, the court in essence told the jury that knowledge of illegal importation by petitioners was *not* necessary.

This impact is further fortified by the court's statement to the jury on the law of conspiracy that a conspirator did not have to know all the details of the conspiracy.

The Government in its brief and oral argument to the Court of Appeals conceded "that where a conspiracy to violate Title 21 U.S.C. §174 is charged under Title 18 U.S.C. §371, the government is required to show that the appellants knew the heroin was illegally imported" and that "the Government offered no direct proof of importation. Consequently, unless the jury is entitled to rely on the presumption that where possession of heroin has been shown, it may infer the appellants knew the heroin had been illegally imported, the proof was insufficient. We see no reason why the jury should not have been able to rely on the presumption" (Gov't brief below, p. 10).

But the answer to this contention is that the trial court did not instruct the jury that the statuory presumption from possession of Section 174, Title 21 U.S.C., could be utilized, (if it could), under the general conspiracy charge. Nor can it be said here that this error was cured because the Court instructed the jury under the substantive counts (one and

four) that guilty knowledge of illegal importation could be inferred from the fact of possession to establish the essential element of those two substantive crimes.

In *United States* v. *Massiah,* 307 F.2d 62, 70 (2d Cir. 1962) *rev'd on other grounds,* 377 U.S. 201 (1964), the Court in answer to a similar contention stated:

> "Thus, the court [trial] . . . omitted to charge, indeed rejected the idea, that the jury must find that the drugs were imported to the knowledge of each defendant in violation of law. Judge Waterman and I find no justification in law or logic for the assertion that the charge was saved by the court's earlier recital of section 173 or by the proper charge on the count charging Massiah with a substantive violation of section 174 and 174 of Title 21. In view of the charge as a whole, in which the essential elements of each offense were carefully enumerated for the jury, it must be assumed that the jury relied on the court's listing of the elements, and did not consider additional elements provided by their own interpretation of the elements involved in a conspiracy violation of section 174."

The Court of Appeals further stated in footnote one of *Messiah* (p. 70):

> "It is, of course, irrelevant that the jury must have found possession, in at least some instances, because knowledge of importation is not automatically presumed as a matter of law from possession, but is an inference that the jury is *permitted* to make. United States v. Mont, 306 F.2d 412 (2d Cir. 1962)." [Emphasis in original.]

Further we know of no rule of law which permits a specific statutory presumption created by Congress for a

specific statute to be freely transferable to another statute without prior Congressional approval. It is reasonable to assume that Congress was well aware of the general conspiracy statute when it enacted the conspiracy clause of §174, Title 21, U.S.C., and the statutory presumption embodied therein. Congress did not specifically provide in its enactment of §174 that the statutory presumption was transferable and applicable to a general conspiracy under §371, Title 18, U.S.C. to violate the narcotics law. We submit that without such approval the statutory presumption is without any validity to a conspiracy under §371, Title 18, U.S.C.

The Court of Appeals action in affirming petitioners' conviction of conspiracy without opinion is in conflict with its prior decision in *United States* v. *Messiah,* Id., tacitly affirmed on this point by this Court, and with the decision in *Mason* v. *United States,* 383 F.2d 107 (10 Cir. 1967).

Petitioners' trial was unfair due to the trial court's erroneous instructions as to the law of conspiracy where narcotic drugs are involved.

3. *Evidence was completely lacking to establish that petitioner, Augustine Luna, unlawfully carried a firearm during the commission of a felony. The trial Court conceded that the Government did not meet the proof required. The trial Court should have dismissed Count Five. Furthermore the introduction of such evidence, without establishing unlawfulness, prejudiced the entire case and is grounds for reversal of the entire case.*

Petitioner Augustine Luna was also indicted and found guilty of a violation of §924 (c) (2), Title 18, U.S.C., in that on November 7, 1969, he unlawfully carried a firearm

during the commission of a felony which was prosecutable in a Court of the United States.

In instructing the jury as to the essential elements of this Count, the Court charged:

> "The essential elements would be that the defendant who is charge, [d, sic], with carrying a firearm, that he was committing a felony which is the basic question you have to determine whether there was a transaction with respect to heroin and that the charge [sic, carrying] of the firearm was unlawful and not pursuant to any permit or license." (T.T. 469).

At the conclusion of the charge, the Government prosecutor requested the Court to change its instructions as to the elements above given (T.T. 483).

> "Mr. Boyd: I respectfully request that your honor's charge regarding the firearm, that the question of a permit is not a necessary theory and they did not concern themselves about the matter of a permit.
>
> The Court: I am not sure about that. I am not sure you have your proof on that.
>
> Mr. Boyd: I think that is correct, if you are carrying a firearm while in the commission of a felony, prosecutable in a federal court.
>
> The Court: It says 'unlawfully'.
>
> Mr. Boyd: That's correct.
>
> The Court: You did not prove he did not have a permit and when he got to the stand, he denied having the firearm."

Since it is hornbook law that the burden is upon the Government to prove beyond a reasonable doubt all of the essential elements of the crime charged it was incumbent upon the Government to establish beyond a reasonable

doubt that petitioner Luna was carrying a firearm "unlawfully." This the Government did not do and there was no presumption here similar to that found in §174, Title 21 U.S.C. The Court found that the Government did not establish this essential element and therefore was in error in submitting this charge to the jury. It should have dismissed this count at the end of the Government's case or at the end of the whole case, as a matter of law. Nor could the Court attempt to save this count by submitting to the jury the question of whether appellant had a permit or not. There was no evidence from the Government as to whether petitioner had a permit and it was error to allow the jury to speculate as whether there was one or not. This illegal evidence and unproved charge poisoned and permeated the entire trial.

It was not incumbent upon the petitioner to assume the burden of proof in negating this charge although Augustine Luna did deny he ever had a firearm. Even if the jury disbelieved Augustine Luna's denial, as they must have by their verdict on this count, there was still no evidence at all in the record that Augustine Luna carried a gun "unlawfully." Nor was there any evidence that the gun was even contemplated to be utilized or had even the remotest relation to the crime charged.

The Government conceded that its proof was insufficient to warrant conviction of petitioner Luna under this count (brief p. 14). Although the legislative history casts no light on the use of the word "unlawfully" in section 924 (c) (2) of 18 U.S.C., it is obvious Congress did not intend to make it a crime to carry a firearm during the commission of a federal felony but only to make it a crime if the firearm was carried "unlawfully." But the vagueness of this becomes readily apparent when contemplated with

such crimes as Income Tax Evasion, Securities Frauds and the like.

However the realities of life may affect our thoughts or conclusions, in a criminal trial a defendant can only be denied his life and liberty by evidence establishing his guilt beyond a reasonable doubt. There is *no* evidence here that Augustine Luna, "unlawfully" carried a firearm.

This count should have been dismissed for failure of essential proof and this, in itself, should be grounds for reversal of the entire conviction since the firearm was prejudicially before the jury at all times during the trial including the time prior to its admission into evidence. The Court of Appeals made no statement or gave any opinion as to this issue.

4. *Issue is here taken with the trial court's charge which equated the interests of Government agents with truth in determining their credibility while relegating the interests of petitioners and their witnesses with something less and more mundane.*

The evidence in this case depended on the credibility of the testimony of the federal narcotic agents *vis a vis* the credibility of the testimony of petitioners and their witnesses. The trial court correctly noted and emphasized to the jury that the issue of the credibility of the witnesses was an "important subject".

In its charge as to the credibility of federal agents, the trial court instructed the jury as follows:

> "You are not to give any greater weight or credibility to the testimony of a witness in the case because he is a Government agent. You evaluate his testimony in the same manner as you woull evaluate the testimony of any witness" (T.T. 472).

This portion of the charge was proper and if left alone would not have been a basis for a claim of error. The Court continued however and instructed the jury:

> "Of course, the Government witness has an interest in establishing the truth of what they have told to the Grand Jury and to the jury. You are to determine whether that interest is sufficient so that they might fabricate an entire case, as these defendants assert here. The defendants have an interest even if they are not guilty, of trying to show they are not guilty . . . " (T.T. 473-474). [Emphasis supplied.]

The effect of these instructions was not only to negate the immediately preceding portion of the charge that the testimony of Government agents were to be evaluated in the same manner as any other witness, but also placed Government agents on the same pedestal with Truth by emphasizing that Government agents were concerned with establishing truth not only to this jury but to the Grand Jury, a commendable and highly moralistic vocation.

Such a charge put petitioners at a decided disadvantage before the eyes of the jury. The jury could easily and rati ally infer and conclude that petitioners were not concerned with Truth; that petitioners were concerned only with trying to show, "even if they are not guilty", that they were not guilty by any means; and that Government agents were concerned with a much higher and altruistic plane—Truth.

The Government argued in its brief and at oral argument before the Court of Appeals that petitioners grossly misread this charge and that the trial court intended to convey the opposite impression, that the federal agents might not be telling the truth and might in fact be lying in order to protect themselves from a charge of perjury before the Grand Jury (Gov't brief below p. 13).

If this was what the court intended, it did not upon the plain reading of the charge make that strained impression to the jury, nor could the jury with common sense interpret the charge to conform to the interpretation of the government. The language of the charge speaks for itself.

We believe that petitioners were denied a fair trial by this one-sided charge on credibility in favor of the testimony of the federal agents.

In an attempt to rebalance the scale of justice, petitioners' trial counsel made the following request:

> "*Mr. Evseroff*:
>
> I request you Honor to charge the jury as a matter of law, the witness in this case, Mrs. Stilone is to be considered a disinterested witness.
>
> The Court: If you had asked me that before, I might have done so, but I gave you an opportunity to present requests to charge. I have told them that they can consider the interest and you told them in summation that she is not interested. I am not going to call attention to that at the end of the case." (T.T. 481)

The Court conceded that if the request came sooner, it might have been given, but the Court was not to call the jury's attention to it at the end of the case.

This was the very juncture where it was needed. We believe this refusal by the Court to be serious reversible error because the Court's charge permitted the jury to weigh the credibility of the Government agents and of petitioners on different scales. It further permitted the jury to consider Mrs. Smaldine as an interested witness subject to the qualifications and assessments to be made of such a witness, when in truth and in law, she was a disinterested

witness to be evaluated under less stringent qualifications and assessments. This would have gone a long way in balancing the scale, which was tipped in favor of the Government by the Court's charge as to the lofty motives of the Federal agent as witnesses. Further, an instruction from the Court on the law would have carried the necessary judicial muscle and weight to offset or balance the charge of the Court as to the interests of Government agents *vis a vis* the interests of petitioners.

Nor do we believe, in the interests of justice, that the discretionary procedural duties of a trial court should outweigh the substantive rights of petitioners to have their disinterested witness made known as such to the jury where the question of credibility is so crucial. This Court stated in *Napue* v. *Illinois,* 360 U.S. 264, 269 (1959): "The jury's estimate of the truthfulness and reliability of a given witness may well be determination of guilt or innocence."

CONCLUSION

For the reasons stated above, petitioners were denied a fair trial and due process. The petition for the writ of certiorari should be granted.

Respectfully submitted,

RAYMOND BERNHARD GRUNEWALD
16 Court Street
Brooklyn, New York 11201
Attorney for Petitioners

Of Counsel
JEROME C. DITORE
16 Court Street
Brooklyn, New York 11201

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425-762—71

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1608

AUGUSTINE LUNA AND GUNERSINDA LUNA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals affirmed without opinion (Pet. App. A).

JURISDICTION

The judgment of the court of appeals (Pet. App. A) was entered on March 23, 1971. The petition for a writ of certiorari was filed on April 22, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the instructions on Counts One and Four, each charging the receipt and concealment of unlawfully imported heroin, improperly permitted the jury to base a conviction on those counts on a finding

that petitioners committed offenses not charged therein.

2. Whether it was prejudicial error for the court, which had properly charged that a conviction on the two substantive counts required the jury to find that petitioners knew the heroin had been imported unlawfully, to fail to repeat that instruction in connection with the separate count charging a conspiracy to commit those substantive offenses.

3. Whether the court unfairly implied in its instructions to the jury that only the government witnesses had told the truth.

4. Whether the jury could properly conclude from petitioner Augustine Luna's contradicted testimony, denying that he had carried a revolver, that he did not, in fact, have a license to carry a revolver.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted on five counts of a six-count indictment charging narcotics offenses (all involving heroin) (C. Tr. 1; Tr. 490).[1] Counts One through Three charged that petitioners, on November 6, 1969, received and concealed a quantity of the narcotic with knowledge that it had been unlawfully imported (Count One), dispensed and distributed the same heroin otherwise than in or from an original stamp-

[1] "C. Tr." refers to the clerk's transcript. "Tr." refers to the trial transcript, in three consecutively paginated volumes. Both transcripts are on file with the Clerk of this Court.

bearing package (Count Two), and transferred it without a written order of the transferee on an officially issued order form (Count Three), in violation of 21 U.S.C. 174, 26 U.S.C. 4704(a), and 26 U.S.C. 4705(a), respectively. Count Four charged that, on November 7, 1969, they received and concealed an additional and larger quantity of the drug, in violation of 21 U.S.C. 174. Count Six charged in substance that petitioners conspired to commit the above substantive offenses, in violation of 18 U.S.C. 371. Petitioner Augustine Luna was, in addition, convicted on the remaining Count Five charging him with unlawfully carrying a firearm during the commission of a felony prosecutable in a court of the United States, in violation of 18 U.S.C. (Supp. V) 924(c)(2) (C. Tr. 1; Tr. 490). On October 30, 1970, Augustine Luna was sentenced to 15 years' imprisonment on each of Counts One, Three, and Four, ten years on Count Two, one year on Count Five, and five years on Count Six, the sentences on Counts One, Two, Three, Four, and Six to run concurrently with one another but consecutively to that on Count Five, for a total of 16 years; and to pay a $5,000 fine on Count Four (C. Tr. 3). Gunersinda Luna was sentenced to twelve years on Counts One, Three, and Four, ten years on Count Two, and five years on Count Six, all to run concurrently, and to pay a $2,500 fine on Count Four (C. Tr. 4). The court of appeals affirmed (Pet. App. A).

Shortly after 7:00 p.m. on November 6, 1969, Agent Carlos Rivera of the Bureau of Narcotics and Dangerous Drugs was introduced to petitioner Augustine

Luna in Luna's basement apartment on Second Street, in Brooklyn, New York; Augustine was told Agent Rivera was a dealer in narcotics who could be trusted (Tr. 47–48, 96–97, 103).[2] Augustine told the agent that he had a kilogram of cocaine for sale. When the agent expressed interest in buying it, Augustine told his wife, petitioner Gunersinda Luna, who was present, to go and get an eighth of a kilogram of the narcotic. Gunersinda left the apartment, walked a short distance along Second Street within the view of two other agents maintaining surveillance of the area from an alleyway, and then passed beyond their range of vision; she returned five minutes later with a quantity of cocaine wrapped in tinfoil (Tr. 47–50, 140–141, 256–257).

Augustine gave the cocaine to Agent Rivera to examine and said the price would be $13,000 (Tr. 49–50). He told the agent that he also had a quarter of a kilogram of heroin for sale, for $6,500. The agent then offered to purchase both drugs at the same time, but at reduced prices of $12,000 for the cocaine and $6,000 for the heroin; this was accepted, but after making a phone call, Augustine said that the heroin was not yet ready and told the agent to call him later that evening (Tr. 50–51). As Agent Rivera was about to leave, Augustine asked him if he would like a sample of the heroin. The agent said he would and Augustine instructed his wife to go and get some. Gunersinda ascended an outside stairway to the second

[2] The agent was introduced by a confidential informant of the Bureau who had previously supplied the Bureau with samples of heroin and cocaine which he said he had received from Luna at this apartment (Tr. 169–173).

floor of the premises and returned a few minutes later with a small quantity of heroin wrapped in tinfoil. The agent took the sample and left (Tr. 51–66, 238, 242–243). At 10:30 p.m., the agent telephoned Augustine and, upon being told that the heroin was ready, said he would get it and the cocaine the next day (Tr. 67–69).

At 3:30 p.m. the next day, November 7, 1969, Agent Rivera drove to the Luna apartment with another agent, Vincent Guadagnino (Tr. 69–72). While Guadagnino remained in the automobile, Rivera entered the apartment. The agent told Augustine that he had left the $18,000 purchase money with his "partner" outside because he did not wish to bring that much money into the apartment until he had seen the narcotics (Tr. 72). At her husband's request, Gunersinda then left the apartment; agents watching nearby observed her enter the premises next door and emerge a few minutes later carrying a shopping bag, in which were two packages. One of the packages contained 189 grams of a heroin-containing mixture (Tr. 72–73, 147–148, 245–248, 262–263).

Gunersinda showed the packages to Agent Rivera, saying that one contained cocaine, the other heroin. The agent examined the contents of the packages, said he was satisfied and would get the money, and left the apartment (Tr. 73, 77). Agent Rivera then informed Agent Guadagnino that he had seen the narcotics; he was given a package containing the purported purchase money, and entered the apartment. Agent Guadagnino, who tried also to enter, was not

admitted, however. When Agent Rivera observed that Augustine was about to lock an iron gate that separated a hallway of the premises from the street, he identified himself and placed Augustine under arrest (Tr. 77–78). Agent Guadagnino, with five or six other agents who had been in the vicinity, thereupon entered the premises to assist Agent Rivera (Tr. 78, 149, 263–264). A fully loaded .22-caliber revolver was removed from Augustine's belt (Tr. 79, 155, 264–265). After Gunersinda Luna, who resisted arrest, had been subdued, her mother, who had also been in the apartment, slapped her face, saying "Damn money, no good money. I told you not to get into this business" (Tr. 266, 363, 366–367, 387–388).

At trial, petitioners, testifying in their own behalf, denied that they had ever had anything to do with any narcotics transaction (Tr. 324–325, 327, 329–330, 354–355); they contradicted the agents' testimony in practically every material detail.[3] Augustine denied, among other things, that he had ever possessed or seen

[3] For example, both petitioners denied being at home the evening of November 6 (Tr. 321, 326, 333, 345, 351, 352). Gunersinda denied visiting the premises next door on November 7 (Tr. 325, 343–344). Augustine testified that immediately prior to the arrests he had been "upstairs" in the apartment getting ready to go to work (Tr. 353–354, 357–358). Gunersinda testified that just prior to the arrests she had been standing in front of the apartment talking to a man who had arrived shortly before by automobile; that the man suddenly went back to the car and grabbed a package from another man who had come with him; and that the pair then came at her "with a gun" and pushed her into her house (Tr. 323–324, 328–329). Both denied that Gunersinda's mother was in the apartment when the arrests occurred (Tr. 344, 358).

the revolver which three agents testified was removed from his person when he was arrested (Tr. 355); Gunersinda similarly attested that her husband had had no gun (Tr. 330).

ARGUMENT

1. Counts One and Four charged that petitioners had "received and concealed" a quantity of heroin. The statute on which the counts were based, 21 U.S.C. 174, prohibits, in addition to receiving and concealing, "facilitat[ing] the transportation [or] concealment" of heroin. In instructing the jury as to the elements of the offenses charged in these counts, the trial court stated that the first element was "the act or acts of receiving or concealing or facilitating the concealment or transportation of" the heroin (Tr. 465; Pet. 11–12). Petitioners contend that by including in the instruction the reference to "facilitating" concealment or transportation, the court permitted the jury to convict on these counts on the basis of findings that petitioners committed offenses not charged (Pet. 10–15). No objection to this portion of the instruction was made at the trial, however, and its assignment here as error is consequently foreclosed. Fd. R. Crim. P. 30. The contention in any case has no merit.

On this record the jury could not have found that petitioners "facilitated" concealment or transportation of the heroin without also finding that they received and concealed it. Every act involving the heroin that was testified to at the trial was committed solely by petitioners, in concert. This, then, is not a case where the accused, charged with receipt and concealment,

allegedly acted through others, and thus never actually possessed the narcotic himself. Here, even if it could reasonably be argued that the jury possibly convicted petitioners on a "facilitation" theory—a point we dispute—plainly it could not have reached that conclusion on this record without first finding petitioners guilty of the specific crimes charged. There is thus no basis for a claim of prejudice.[4]

2. Petitioners contend that the court erred in failing to instruct the jury that to convict them on the conspiracy count it was necessary to find that petitioners knew the heroin had been unlawfully imported (Pet. 15–20). This claimed error likewise went unchallenged at the trial and the contention, consequently, is similarly precluded. In any event the contention is insubstantial.

Since the offenses petitioners allegedly conspired to commit included that prohibited by 21 U.S.C. 174—*i.e.*, receipt and concealment of narcotics known to have been unlawfully imported—petitioners contend that knowledge that the heroin had been unlawfully imported was also required to be proved under the conspiracy count. Cf. *United States* v. *Massiah*,

[4] Petitioners' suggestion that there was no proof that they received or concealed the heroin (Pet. 15) is also without substance. The jury was warranted in finding, for example, that the heroin involved in Count Four, which the evidence showed Gunersinda Luna procured from the premises next door, was received by her from someone at that address. And the fact that petitioners did not attempt to conceal the heroin from Agent Rivera, whom they took to be an accomplice, did not negate the inference, compelled by the evidence as a whole, that they sought to conceal it from enforcement officers.

307 F. 2d 62, 70–71 (C.A. 2), reversed on other grounds, 377 U.S. 201; *United States* v. *Agueci*, 310 F. 2d 817, 825 (C.A. 2), certiorari denied, 372 U.S. 959. To be sure the court, in its instructions dealing with the conspiracy count, did not specifically mention this element (Tr. 469–471; Pet. 16–17). But, in its instructions relating to Counts One and Four (the substantive counts based on Section 174), the court did explain the necessity of proof of such knowledge, and advised the jury, in accordance with the authorization contained in Section 174 (cf. *Turner* v. *United States*, 396 U.S. 398), that it could infer such knowledge from possession of the heroin if possession was not explained to the jury's satisfaction (Tr. 465–466; Pet. 14). The jury, in convicting on those substantive counts, necessarily drew the permitted inference and found that petitioners had the requisite knowledge. Hence, the failure of the court to repeat the same instruction in charging the jury on the conspiracy count was, even if erroneous, harmless error in the context of this case. *United States* v. *Baratta*, 397 F. 2d 215, 225–226 (C.A. 2), certiorari denied, 393 U.S. 939; *United States* v. *Chow*, 398 F. 2d 596, 597 (C.A. 2).

Moreover, since petitioners' sentences on the conspiracy count are to run concurrently with their longer sentences on substantive Counts One through Four, the concurrent sentence rule is applicable here. Consequently, the present contention is one that this court can appropriately decline to consider as a matter of "judicial convenience."

3. The court, after charging the jury that it should not give greater weight or credibility to the testimony of a witness because he was a government agent and should evaluate the agents' testimony as it would that of any other witness, added (Tr. 473–474):

> Of course, the government witness has an interest in establishing the truth of what they [*sic*] have told to the Grand Jury and to the jury. You are to determine whether that interest is sufficient so that they might fabricate an entire case, as these defendants assert here. The defendants have an interest, even if they are not guilty of the offense, of trying to show that they are not guilty and you can consider the interest of witnesses on both sides as to which set of facts you are going to believe.

Petitioners contend that the quoted charge unfairly placed the government witnesses "on the same pedestal with Truth," while suggesting that petitioners had a less disinterested motive in testifying (Pet. 23–26). As in the case of the instructions previously considered, however, the criticized charge was not objected to at the trial, and the claim of error, consequently, comes too late. In any event this instruction did not have the effect that petitioners seek to ascribe to it. When read in the context of the court's introductory instruction—to the effect that a government agent's testimony should not be given greater credit than that of any other witness merely because of his official status—the criticized instruction reflected an effort by the court to be as impartial as circumstances permitted. What the court quite clearly meant by the

first part of the instruction was that the government agents were not necessarily telling the truth and that they might possibly be fabricating an entire case against petitioners (as petitioners maintained) in order to shore up earlier false testimony given by them.[5]

4. The statute on which Count Five was based, 18 U.S.C. (Supp. V) 924(c)(2), provides for the punishment of "[w]hoever * * * carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States." The

[5] Mrs. Helen Smaldone, a defense witness who lived on the top floor of the premises where petitioners resided and had known petitioners for three years (Tr. 295–296, 303), gave testimony substantially corroborative of Gunersinda Luna's testimony that immediately prior to the arrests two men, with one of whom she had been talking, pushed her into the apartment (Tr. 298–300; *supra*, n. 3). At the close of the instructions, defense counsel requested the court to instruct the jury "as a matter of law" that Mrs. Smaldone was "to be considered a disinterested witness." The court said it might have given such a charge if counsel had requested it prior to the instructions, but that it was not going to call the jury's attention to the point at that time (Tr. 481). Contrary to petitioners' contention that this ruling was reversible error (Pet. 25–26), the refusal was a proper exercise of discretion. As the court noted in the colloquy (Tr. 481), the jury had been told that it could consider a witness' interest in evaluating his or her testimony and counsel had argued in his summation that Mrs. Smaldone had no interest (Tr. 430–432, 472). The court properly concluded in these circumstances that to recall the jury specially to give the requested instruction would have given the matter unwarranted emphasis. Moreover, it is questionable whether, in light of Mrs. Smaldone's three-year acquaintance with petitioners and occupancy of the same apartment house, petitioners were entitled to a special instruction to the jury that she was a disinterested witness.

government proved through the testimony of three agents that Augustine Luna was carrying a revolver at the time of the November 7 narcotics offense (a felony), but it did not show that his carrying of the firearm was unlawful *per se* under state or local law. Augustine, testifying in his own behalf, denied having ever seen or possessed the questioned revolver (Tr. 355).[6] The trial court instructed the jury that to convict on this count it was required to find that Augustine Luna was carrying the firearm "not pursuant to any permit or license" (Tr. 468–469). Luna contends that the evidence on this count was insufficient as a matter of law and that he was, therefore, entitled to acquittal (Pet. 20–23).

Concededly, as the government acknowledged in the court of appeals, the government's proof on Count Five was deficient at the close of its direct case. No evidence having been adduced that Luna lacked a license for the revolver,[7] there was at that time no basis for a finding that his carrying of it had been unlawful. But, when Augustine Luna thereafter took the stand and denied possessing the firearm—a denial which was in direct conflict with the testimony of the government agents—he himself furnished a basis for a finding that his possession of the gun had

[6] Mrs. Luna similarly denied that her husband had possessed the firearm (Tr. 330).

[7] That the unlicensed carrying of a revolver in New York was unlawful was properly the subject of judicial notice. See N.Y. Penal Law, §§ 265.00(3), 265.05(3), 265.20(a)(3), 400.00.

been unlawful and warranted the court's submission of the issue to the jury.[8] The jury could properly conclude from the conflicting testimony concerning possession of the revolver that Augustine Luna had no license for the gun; a reasonable inference could be drawn by the jury that there was no other reason for his denial of possession. Otherwise, why did he not produce the permit and thereby completely exonerate himself of this charge? The jury properly drew from Augustine Luna's false denial of possession the inference that his carrying of the gun had been, as the court charged it was required to be, "not pursuant to any permit or license."

[8] At the close of the government's case-in-chief, defense counsel had unsuccessfully moved for a judgment of acquittal on all counts, but without focusing on Count Five or otherwise adverting to the present issue (Tr. 291–292). Counsel renewed the motion at the close of all the evidence, again without allusion to the issue, and that motion too was denied (Tr. 394). The government relied below—and we rely here—on the rule that where a defendant introduces evidence, he waives his objections to the denial of a prior motion to acquit, and that a reviewing court will in those circumstances determine the sufficiency of the proof on the basis of the entire record, including the defense's evidence. See, *e.g.*, *United States* v. *Calderon*, 348 U.S. 160, 164 n. 1; *United States* v. *Feldman*, 425 F. 2d 688, 692 (C.A. 3); *United States* v. *Rawls*, 421 F. 2d 1285, 1286 (C.A. 5); *Viramontes-Medina* v. *United States*, 411 F. 2d 981, 982 (C.A. 9); *United States* v. *Gordon*, 410 F. 2d 1121, 1122 (C.A. 5), certiorari dismissed, 396 U.S. 938; *United States* v. *Dolleris*, 408 F. 2d 918, 922–923 (C.A. 6), certiorari denied, 395 U.S. 943; *Thompson* v. *United States*, 403 F. 2d 209, 210–211 (C.A. 5).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
PHILIP R. MONAHAN,
Attorney.

MAY 1971.

CERTIORARI
DENIED
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